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NO. 957941

SUPREME COURT OF THE STATE OF WASHINGTON

State of Washington,

Respondent,

v.

Jason Michael Catling,

Petitioner.

**MEMORANDA OF *AMICUS CURIAE*
NORTHWEST JUSTICE PROJECT
IN SUPPORT OF PETITION FOR REVIEW**

NORTHWEST JUSTICE PROJECT

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I. INTRODUCTION

This case raises an important issue of substantial public interest as well as substantial questions of constitutional law: Does Washington's system of mandatory LFOs thwart the federal anti-attachment statute protecting social security recipients and does it disproportionately affect people living with disabilities and people of color? Mr. Catling asks this Court to determine whether the state can assess mandatory LFOs on a Social Security recipient who will never have the ability to pay when payment is a prerequisite of exiting the criminal justice system.

The State has authority to require assessment of LFOs on those who have the ability to pay. However, when a Defendant is disabled, indigent, and has no ability to pay, the mandatory assessment is discriminatory and violates federal anti-attachment law. Mandatory LFOs serve as a permanent barrier for convicted defendants with disabilities to reenter society. Mandatory LFOs also perpetuate racial inequities. The Court should accept review because mandatory LFOs disproportionately impact people living with disabilities and people of color, and the *Petition for Review* presents issues of substantial public importance.

II. IDENTITY AND INTEREST OF AMICUS

The Northwest Justice Project is the largest statewide publicly funded provider of civil legal services in Washington. In 2017,

approximately 37.8% of all NJP cases involved a client who received some form of social security income. As part of NJP's current strategic advocacy focus on economic justice, attorneys represent debtors with legal financial obligations in almost every county and municipality in the state. NJP is in a unique position to provide information regarding the impact of mandatory LFOs on people living on social security income.

III. STATEMENT OF THE CASE

Amicus adopts and incorporates by reference the Statement of the Case in the *Petition for Review* to the Supreme Court.

IV. ARGUMENT

*"A debt must be capable of being paid, if it is not instead a lifetime yolk of servitude."*¹

A. **Mandatory LFOs disproportionately impact defendants living with disabilities whose sole source of income is SSI or SSDI**

1. **Defendants whose sole source of income is SSI or SSDI are disabled and do not have an ability to pay LFOs**

In order to have an ability to pay, Defendants must first be able to meet their basic needs; food, clothing, shelter, utilities, transportation, hygiene, and other necessary incidentals. SSI provides a minimum, subsistence-level monthly payment to persons who are elderly or disabled, without relevant work history, who lack significant assets, and have no

¹ Attorney General Loretta E. Lynch: *Delivers Remarks at White House Convening on Incarceration and Poverty*, Washington, DC, December 3, 2015.

other means of support. In 2018, the monthly amount SSI recipients receive is \$750.00.² SSI only provides approximately 74 percent of the federal poverty standard for a single person.³ Eligibility requires not only proof of indigence, but also medical proof—to a standard specified and accepted by the Social Security Administration—establishing that the applicant has the inability to engage in any substantial gainful activity because of a medically determinable mental or physical impairment.⁴

This same medical requirement applies to the SSDI program.⁵ A person suffering from a disability will receive SSDI, if they have enough work history paying social security taxes from their income.⁶ The average monthly SSDI benefit as of April 2018 is \$1,060.34.⁷ The average monthly SSDI benefit only provides approximately 84 percent of the federal poverty standard for a single person.⁸

In Washington, GR 34 provides a uniform standard for determining whether an individual is indigent.⁹ Under GR 34, an

² *SSI Federal Payment Amounts for 2018*, Social Security Administration, <https://www.ssa.gov/OACT/cola/SSI.html> (last visited June 29, 2018).

³ Annual Update of the HHS Poverty Guidelines, 83 C.F.R. § 2642-2644 (2018).

⁴ 42 U.S.C. § 1382-1382b.

⁵ 42 U.S.C. § 423.

⁶ *Id.*

⁷ *Social Security Monthly Statistical Snapshot April 2018*, Social Security Administration, https://www.ssa.gov/policy/docs/quickfacts/stat_snapshot/2018-04.pdf (last visited on June 28, 2018).

⁸ *Supra* note 3.

⁹ *Jafar v. Webb*, 177 Wn.2d 520, 523, 303 P.3d 1042 (2013).

individual is considered indigent if they receive SSI or if their household income is at or below 125 percent of the federal poverty guidelines.¹⁰ If someone meets the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs.¹¹ Both SSI recipients and the majority of SSDI recipients meet the GR 34 standard of indigence.

2. The collateral consequences of mandatory LFOs coerce defendants with disabilities to use their federally protected Social Security income to pay LFOs.

The collateral consequences of mandatory LFOs coerce indigent defendants with disabilities to use their federally protected benefits to pay LFOs. When a court imposes mandatory LFOs on Social Security recipients, it requires them to make a choice: forgo essential needs to pay the LFO or continue in perpetual collection. Unable to receive a certificate of discharge and/or vacate their conviction, indigent defendants with disabilities will never be able to fully participate as a Washington citizen.

Defendants like Mr. Catling are subjected to other legal processes even if the sentencing court does not require payments to be made from funds subject to 42 U.S.C. § 407(a). Requiring disabled, indigent defendants to be continually summoned to the clerk's office to "provide periodic updates regarding [their] income and ability to pay" places them

¹⁰ GR 34(a)(3)(A), (B).

¹¹ *City of Richland v. Wakefield*, 186 Wn.2d 596, 607, 380 P.3d 459 (2016).

in a precarious situation.¹² Failure to appear before the clerk will likely lead to being summoned to appear before a judge.¹³ The only way to end the perpetual probation is to use their federally protected funds to pay the LFO. Indigent defendants with disabilities are continually coerced to pay the LFOs out of their meager income so they can have the same liberties as those defendants who are able to repay their LFOs.

Unable to pay the LFOs, indigent defendants with disabilities will never be able to obtain a certificate of discharge. Among other things, a certificate of discharge is a prerequisite to vacating a conviction.¹⁴ A certificate of discharge is only available after a person satisfies all of their sentencing requirements, including paying all LFOs.¹⁵ After receiving the certificate of discharge, a person must then wait the applicable period before asking the trial court to vacate the conviction.¹⁶ Defendant's like Mr. Catling are coerced into using their social security income to pay their LFOs in order to obtain a certificate of discharge.

Another consequence of LFOs is it hinders indigent defendants with disabilities from obtaining safe and affordable housing. Many landlords will not rent to an applicant with an outstanding judgment,

¹² See *Petition for Review*, at 6 (quoting *Resp. Br.* at 14).

¹³ See RCW 9.94A.6333.

¹⁴ RCW 9.94A.640.

¹⁵ RCW 9.94A.637.

¹⁶ *Supra* note 14.

including an LFO judgment. Aside from the lingering debt, landlords can use the ongoing criminal matter as pretext for discrimination against a disabled, indigent tenant. Unable to vacate an otherwise eligible conviction further inhibits chances of securing housing. Many landlords will not rent to a person with a felony conviction. This means indigent defendants with disabilities are disproportionately denied housing because of their inability to vacate their criminal record. While access to housing is a compelling interest in its own right, the impacts of not having housing only further exacerbates the coercive nature of mandatory LFOs.¹⁷

Even if the clerk is not actively collecting the LFO, the perceived fear that the clerk may take action puts people living with disabilities in unnecessary distress. For example, one NJP client whose sole source of income for twenty years was SSI, was too scared to leave her home, in fear of an LFO collection warrant out for her arrest. Even after the NJP attorney confirmed there was no current LFO warrant, the client was still too frightened to leave her home. The years of collection warrants resulting in jail time the client had previously experienced had frightened her to the extent where she could not even leave her home.

¹⁷ See, e.g., *Hundtofte v. Encarnacion*, 181 Wn.2d 1, 23-24, 330 P.3d 168 (2014) (Gonzalez, J., dissenting) (“Access to employment, education, voting, health care, and most other public and private interests is greatly diminished, if not eliminated, when stable, suitable housing is unavailable.”).

Another NJP client, who had severe physical disabilities, was coerced into using his SSI income to avoid arrest warrants. Despite getting his discretionary LFOs remitted, he continued to receive notices about his mandatory LFOs. In fear that a warrant would issue for his arrest, he began paying \$25 a month out of his SSI. This client did not have a working propane stove to cook meals, but instead of using his SSI income to repair the stove, he sent monthly payments to the clerk's office.

Mandatory LFOs create a system where indigent debtors are in constant fear of arrest for a debt they have no ability to pay. This fear and stress exacerbate a person's disability and strips away the income meant to provide basic essential needs. Washington's current mandatory LFO scheme unfairly affects people with disabilities living on social security income because they will never be able to pay the LFOs, keeping them in perpetual collection and unable to vacate their record.

B. Mandatory LFOs Disproportionately Impact People of Color

The overrepresentation of people of color in the criminal justice system is often the result of systemic prejudices.¹⁸ Racial disparities start long before trial and sentencing, in the interactions between police and people of color.¹⁹ Historic over-policing of minority neighborhoods,

¹⁸ Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, 40-58 (2010).

¹⁹ *Id.*

higher rates of arrest and conviction, majority white juries, and disproportionate sentencing all contribute to this disparity.²⁰ Because of the overrepresentation of people of color in our criminal justice system, mandatory LFOs disproportionately affect communities of color. Requiring the assessment of mandatory LFOs, regardless of an individual's ability to pay, means communities of color will continue to bear the brunt of systemic and structural oppression.²¹

As discussed above, the assessment of mandatory LFOs inhibit a defendant's reentry and prevent the ability to obtain a certificate of discharge to restore civil rights. An active criminal record will impair not only a person's access to housing, but also their right to participate in societal and civic functions like jury service.²² The right to "fully participate as a Washington citizen" is an important right that should not be easily dismissed.²³ In recognition of this important right, this Court recently adopted GR 37. Because of racial disparities in jury service, GR 37 aims to "eliminate the unfair exclusion of potential jurors based on race or ethnicity."²⁴ However, GR 37 only works if jurors of different races and

²⁰ *Id.*

²¹ See, e.g., Task Force on Race and the Criminal Justice System, *Preliminary Report on Race and Washington's Criminal Justice System* (2011).

²² See RCW 2.36.070.

²³ *State v. Catling*, 2 Wn. App. 819, 828, 413 P.3d 27 (2018) (Fearing, C.J., dissenting).

²⁴ GR 37(a).

ethnicities qualify to serve as jurors. A system that requires the assessment of mandatory LFOs for individuals who will never have an ability to pay means Washington jury pools will remain disproportionately white.

C. LFO Collection Practices Vary Statewide

The mandatory LFO collection system's impact on indigent debtors varies statewide mainly in part due to the discretion given to the local county clerks and how the legislature funds the court system. There are 39 counties in Washington, with each county having its own independently elected superior court county clerk statutorily authorized to collect LFOs and charge up to \$100 for collection.²⁵ Each clerk has discretion on their local collection practices. However, there is a large disparity on how aggressively clerks collect LFOs. Some clerks collect the fee, while others do not.²⁶ Some clerks charge a collection fee for each case a debtor may have, others only charge it once.²⁷ Counties with smaller populations impose higher legal financial obligations penalties than other counties.²⁸ Clerks may also choose to assign the debt to private collection agencies for collection.²⁹

²⁵ RCW 9.94A.780(7); RCW 36.18.019(29).

²⁶ LFO Stakeholder Consortium, *Progress Report 2018 LFO Symposium*, at 15, (2018), <https://www.courts.wa.gov/subsite/mjc/docs/2018/LFO%20Stakeholder%20Consortium%20Progress%20Report.pdf>.

²⁷ *Id.*

²⁸ *See State v. Sorell*, 2 Wn. App. 156, 176, 408 P.3d 1100 (2018).

²⁹ RCW 36.18.190.


As was suggested by the State in this matter, defendants like Mr. Catling may be required by the clerk to come in periodically to prove they still receive SSI or SSDI. How often this occurs is up to the discretion of the county clerk. Given the way Washington's court system receives funding, a county short on revenue may force a clerk to act more aggressively than a clerk in a different county. These factors lead to inconsistent treatment of debtors from one county to the next. Since the court retains jurisdiction on all felonies committed after July 1, 2000, a person living on social security income could be on permanent collection by a county clerk's office for the rest of their life.³⁰


V. CONCLUSION

Mr. Catling is just one of thousands of indigent debtors stuck in Washington's mandatory LFO scheme. When courts sentence SSI/SSDI recipients to pay mandatory LFOs, defendants like Mr. Catling suffer harsh consequences for the rest of their lives. The Court should grant review to address the constitutionality of mandatory LFOs in Washington.

Dated this 3 day of July, 2018.

Respectfully submitted,


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³⁰ RCW 9.94A.760(4).

CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that on this 3rd day of July 2018, I electronically filed the foregoing with the Clerk of the Supreme Court of the State of Washington by using the Washington State Appellate Courts' Portal, which will send a notice of electronic filing to all counsel of record.

SIGNED at Walla Walla, WA, this 3rd day of July 2018.



David Surratt
Legal Assistant
Northwest Justice Project

NORTHWEST JUSTICE PROJECT - WALLA WALLA

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